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Supreme Court, U.S.
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No. 97-1080

In the Supreme Court of the United States

OCTOBER TERM, 1997

BARBARA CHIOMA OHUEGBE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the 30-day time period for filing a petition for judicial review of a final order of deportation under Section 309(c)(4)(C) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-626, as amended by Pub. L. No. 104-302, 110 Stat. 3656, was correctly applied to petitioner's case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) and the decision of the Board of Immigration Appeals (Pet. App. B1-B3) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1997. A petition for rehearing was denied on August 21, 1997. The petition for a writ of certiorari was filed on October 20, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Nigeria who entered the United States on March 20, 1982, as a

nonimmigrant student. Pet. App. B1. On February 2, 1995, the Immigration and Naturalization Service (INS) served petitioner with an order to show cause why she should not be deported, charging petitioner with deportability under former Section 241(a)(1)(C)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1)(C)(i) (1994), as an alien who was admitted as a nonimmigrant and failed to maintain, or to comply with the conditions of, the status under which she had been admitted. Pet. App. B1-B2.[1]

On December 15, 1995, an immigration judge (IJ) presided over a deportation hearing at which petitioner testified, found petitioner to be deportable as charged, and denied petitioner's request for suspension of deportation under former Section 244(a)(1) of the INA, 8 U.S.C. 1254(a)(1) (1994). Pet. App. B1.[2] The IJ denied petitioner's request on the ground that she failed to establish that her deportation would result in extreme hardship to herself or to an immediate relative who is a citizen or lawful permanent resident of the United States. *Id.* at B2. The IJ granted petitioner voluntary departure in lieu of deportation. *Id.* at B1.

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[1] Former Section 241 of the INA was amended and redesignated by Sections 301(d) and 305(a)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-579, 3009-598, as Section 237 of the INA, 8 U.S.C. 1227 (Supp. II 1996).

[2] Former Section 244 of the INA was repealed by IIRIRA, § 308(a)(7), 110 Stat. 3009-615, and the provisions were incorporated in new Sections 240A and 240B of the INA, 8 U.S.C. 1229b, 1229c (Supp. II 1996). See IIRIRA § 304(a), 110 Stat. 3009-587, 3009-594 to 3009-597.

2. On November 13, 1996, the Board of Immigration Appeals (Board) dismissed petitioner's appeal of the IJ decision. Pet. App. B1-B3. The Board ruled that the IJ's decision to deny the request for suspension of deportation "was proper and correct" for the reasons stated by the IJ. *Id.* at B2. The Board noted that the IJ had considered all the record factors and that it agreed with the IJ that the record "failed to establish extreme hardship to the [petitioner] or to a qualifying relative within the meaning of the Act." *Ibid.*

3. Meanwhile, on September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, and, on October 11, 1996, amended IIRIRA in certain respects, Pub. L. No. 104-302, 110 Stat. 3656. In Section 306(b) of IIRIRA, 110 Stat. 3009-612, Congress repealed former Section 106 of the INA, 8 U.S.C. 1105a (1994), which had allowed a petition for review of a Board decision to be filed in the court of appeals within 90 days of the date of the issuance of the final deportation order. Section 306(a)(2) of IIRIRA, 110 Stat. 3009-608, added new Section 242(b)(1) to the INA, 8 U.S.C. 1252(b)(1) (Supp. II 1996), which requires that petitions for review of Board decisions be filed in the court of appeals "not later than 30 days after the date of the final order of removal." Under IIRIRA § 306(c), as amended, the amendments made by IIRIRA § 306(a) and (b) apply "as provided under Section 309" of IIRIRA. 110 Stat. 3009-612, 3657. In Section 309(c)(4) of IIRIRA, as amended, Congress specified that, where a final order of deportation is entered more than 30 days after the date of the enactment of IIRIRA (*i.e.*, more than 30 days after September 30, 1996), a petition for judicial review must be filed not later than 30 days after the

date of the final order of exclusion or deportation. Congress specified that that 30-day deadline applies "notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary." 110 Stat. 3009-626, 3657.

4. On January 9, 1997, more than 30 days after the Board's issuance of the final order of deportation, petitioner filed a petition for review in the court of appeals. Pet. App. A1. The court of appeals granted the INS's motion to dismiss the petition for lack of jurisdiction. The court noted that former Section 106 of the INA, 8 U.S.C. 1105a (1994), which had allowed petitions for judicial review to be filed up to 90 days after issuance of a final deportation order, had been repealed by IIRIRA. Pet. App. A1. It also noted that Section 309(c)(4)(C) of IIRIRA specifically addresses transition cases such as petitioner's where deportation proceedings were pending at the time of enactment of IIRIRA. The court held that, because the Board entered its decision on November 13, 1996, the 30-day deadline imposed by Section 309(c)(4)(C) of IIRIRA was applicable, and the court therefore lacked jurisdiction over the petition for review. Pet. App. A1-A2. The court noted that two other circuits, when faced with appeals from final deportation orders entered in November of 1996, had reached the same conclusion. *Ibid.* (citing *Ibrik* v. *INS*, 108 F.3d 596 (5th Cir. 1997), and *Narayan* v. *INS*, 105 F.3d 1335 (9th Cir. 1997)).

ARGUMENT

Petitioner contends (Pet. 7) that, because she was in deportation proceedings at the time of the enactment of IIRIRA, her case should be governed by the

general transitional effective date for aliens in deportation proceedings set forth in Section 309(c)(1) of IIRIRA. Petitioner maintains (*ibid.*) that the court of appeals erred in concluding that her petition for review was governed by the exception to the general transitional rule in Section 309(c)(4)(C) of IIRIRA, which requires petitions for review to be filed within 30 days of a final order of deportation in cases where the final order of deportation was entered more than 30 days after enactment of IIRIRA.

1. Petitioner's argument that Section 309(c)(4)(C) is inapplicable to her case appears to be premised on the erroneous view that IIRIRA was enacted on October 30, 1996. See Pet. 7-8. The correct date of enactment of IIRIRA is September 30, 1996. See Pub. L. No. 104-208, 110 Stat. 3009. In light of that fact, an examination of the statutory language demonstrates that the court of appeals did not err in concluding that Section 309(c)(4)(C) of IIRIRA applies to petitioner's case.

Section 309(c)(1) of IIRIRA, as amended, states:

> (1) General Rule That New Rules Do Not Apply.—*Subject to the succeeding provisions of this subsection*, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—
>
> (A) the amendments made by this subtitle shall not apply, and
>
> (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

(emphasis added). The "succeeding provisions" of subsection (c) that are referred to in the opening clause of paragraph (1) of Section 309(c) include paragraph (4) of Section 309(c), as amended, which provides:

> (4) Transitional changes in judicial review.—In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act [*i.e.*, September 30, 1996], notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—
>
> * * * * *
>
> (C) the petition for judicial review must be filed not later than 30 days after the date of the final order of exclusion or deportation.

Thus, Congress explicitly provided that the general rule set forth in Section 309(c)(1) is subject to, *inter alia*, Section 309(c)(4)(C). Section 309(c)(4)(C), in turn, clearly establishes a 30-day filing deadline for petitions for judicial review in cases in which the final order of deportation is entered more than 30 days after September 30, 1996.

Petitioner's case falls squarely within Section 309(c)(4)(C). She was subject to the 30-day filing period because the Board issued the final order of deportation on November 13, 1996, more than 30 days after September 30, 1996. Moreover, Section 309(c)(4)(C) specifies that the new 30-day deadline applies "notwithstanding any provision of Section 106" of the INA, 8 U.S.C. 1105a, as in effect on the date of enactment of IIRIRA, which was the provision

that previously allowed a 90-day filing period. See 8 U.S.C. 1105a (1994) (repealed by IIRIRA § 306(b), 110 Stat. 3009-612).

The Court made clear in *Stone* v. *INS*, 514 U.S. 386, 405 (1995), that "[j]udicial review provisions * * * are jurisdictional in nature and must be construed with strict fidelity to their terms". See also *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 212 (1968) (interpreting 8 U.S.C. 1105a (1964)). Thus, the court of appeals correctly dismissed petitioner's untimely petition for judicial review because it was without jurisdiction over the petition.

2. Petitioner errs in contending (Pet. 9-10) that the court of appeals' ruling is in conflict with the holding of the Ninth Circuit in *Astrero* v. *INS*, 104 F.3d 264 (1996). In *Astrero*, the Ninth Circuit addressed the effective date of Section 309(c)(5) of IIRIRA, not Section 309(c)(4), which is at issue in the instant case. Section 309(c)(5) concerned what retroactive effect a particular new provision of the INA (Section 240A(d)) would have once that provision became effective. See *Astrero*, 104 F.3d at 266. By contrast, Section 309(c)(4) concerns the group of cases in which a final order of deportation or exclusion "is entered more than 30 days after the date of the enactment" of IIRIRA and lists seven requirements that shall apply to such cases. One of those provisions establishes the mandatory 30-day deadline for filing petitions for judicial review. IIRIRA § 309(c)(4)(C). The Ninth Circuit's ruling in *Astrero* regarding the Section 309(c)(5) retroactivity provision that governs a different statutory section has no bearing on the effective date of Section 309(c)(4)(C).

When the Ninth Circuit was, in fact, presented with the same claim raised by petitioner here, that court of appeals reached the same conclusion as the court below, as the court below noted. See Pet. App. A1-A2 (citing *Narayan* v. *INS*, 105 F.3d 1335 (9th Cir. 1997)). The Fifth and Eighth Circuits also agree. *Ibrik* v. *INS*, 108 F.3d 596 (5th Cir. 1997); *Mayard* v. *INS*, 129 F.3d 438 (8th Cir. 1997).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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